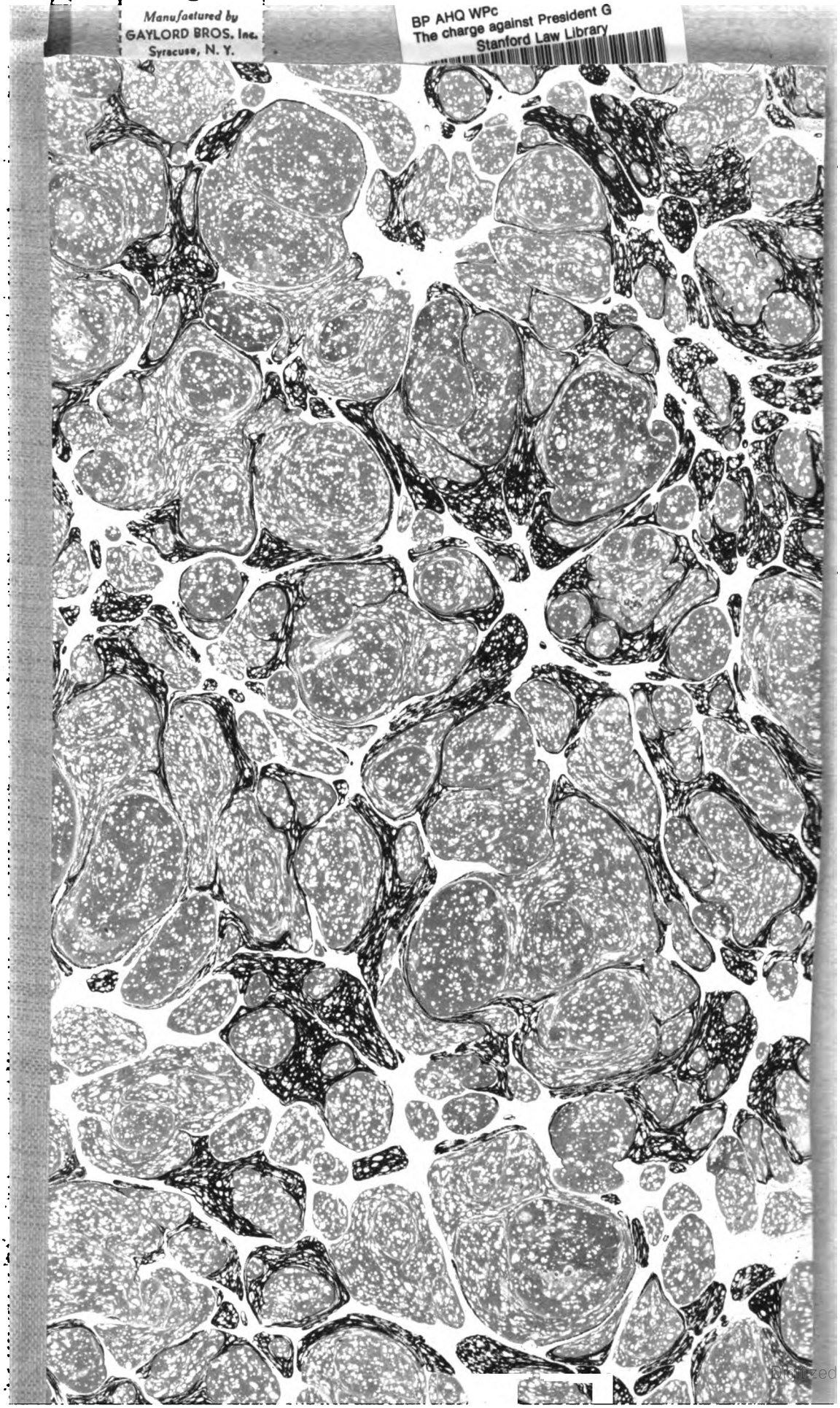
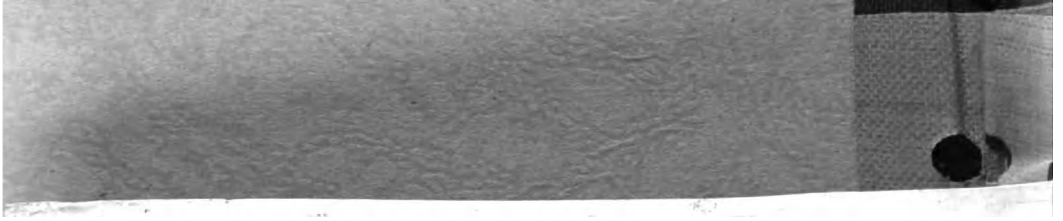
THE CHARGE AGAINST PRESIDENT GRANT





THE CHARGE AGAINST PRESIDENT GRANT AND ATTORNEY GENERAL HOAR OF PACKING THE SUPREME COURT OF THE UNITED STATES, TO SECURE THE REVERSAL OF THE LEGAL TENDER DECISION, BY THE APPOINTMENT OF JUDGES BRADLEY AND STRONG, REFUTED.

LETTER TO THE BOSTON HERALD.

GEORGE F. HOAR.

WORCESTER, MASS.:
PRESS OF CHARLES HAMILTON,
311 MAIN STREET.
1896.

LETTER.

To The Boston Herald:

About a fortnight before the election, when on my way to a dinner of the Norfolk Club, I read in a morning paper that Mr. Fairchild, formerly Secretary of the Treasury, had repeated in a speech before the Reform Club the statement, often contradicted, that the Supreme Court of the United States had been packed to reverse the decision in Hepburn *vs.* Griswold, in which the Court held the Legal Tender Act unconstitutional. At the dinner, a few hours later, I criticised this statement as being as vile a slander as ever was uttered upon the stump. A few days later, relying upon the misinformation received from some correspondent, you stated that I owed an apology to Mr. Fairchild. I do not suppose that Mr. Fairchild was aware of the falsehood of the charge that he endorsed. He only made the too common mistake of adopting, without investigation, an error which had become current in regard to a fact in political history. I do not suppose that you meant to misstate the matter, still less to do a wrong to me or to my brother. You probably desired, as is the habit of political newspapers, to stand by a gentleman with whose opinions you are in general accord.

So I have no controversy into which any element of anger should enter, either with you or Secretary Fairchild. On the contrary, I expect that both of you, when you look carefully at the facts, will be glad to acknowledge that you have shared in a prevalent mistake, and will do justice to the memory of my brother.

You certainly need not trouble yourself about an apology to Secretary Fairchild. If this thing were true, I should almost feel like hiding my dishonored and degraded name from the gaze and memory of man. Judge Hoar was Attorney General in the Cabinet of President Grant when these nominations were made. Justices Strong and Bradley were selected by him after the most careful and anxious inquiry and were named by the President upon his recommendation. While President Grant did not, of course, surrender to anybody the prerogatives or duties of his great office, there is no doubt that his confidence in the judgment of Mr. Hoar had a great deal to do with his appointment of these gentlemen, as it had with the selection of the judges of the new Circuit Court, which the influence of Judge Hoar rescued from senatorial patronage, much to the satisfaction of the profession and to the advantage of the public. Judge Hoar to the day of his death regarded the choice of these two judges with special satisfaction as among the most important, fortunate, and honorable public services of his life.

I suppose that there have been persons in public life to whom the selecting judges of a great court, in order that they might decide questions a particular way, might not seem an unpardonable offence. We have had Presidents who came from communities where the judicial office was not held in the very highest esteem, and whose prior life, perhaps, may not have led them to consider the grave danger of tampering with the judiciary. But no such excuse as that can be pleaded in the case of Judge Hoar. He was a Massachusetts lawyer, and for a great part of his mature life a Massachusetts judge. He knew well the character of such a proceeding and would have loathed it from the very inmost depths of

his soul. He denied it afterward when the transaction was recent, and again and again in later years. So if this thing was done, he did it with a full knowledge of the character of what he did, and lied about it afterward. When you say that you make no attack on him, and that General Grant and not he was President and made these appointments, you do not in the least shield his memory. The judgment of history holds Strafford and Laud to a responsibility quite as great as that which belongs to King Charles.

I think that you will agree with me that to vindicate the honor of a Massachusetts statesman, of whom, so far as I am aware, you have always spoken in your paper in terms of the highest respect; that to vindicate the honor of what we Americans are accustomed to consider the greatest and most august tribunal that ever sat in judgment; that to vindicate the honor of President Grant, who, whatever may have been his faults, his countrymen, without distinction of party, now agree to have been a great soldier and a great President, is worth the considerable space which I ask for it in the columns of your paper.

Now, what are the facts? On the 7th day of February, 1870, the Supreme Court of the United States met at 12 o'clock. The Senate met at the same hour. After the disposition of some other business, Chief Justice Chase announced the decision of the Court in Hepburn *vs.* Griswold. The Court held, in substance, that it was not within the constitutional power of Congress to make the United States Treasury notes legal tender for debts, past or future. The Chief Justice in his opinion said, in substance, that this power was not expressly granted to Congress by the Constitution, and was not implied as being necessary to the execution of

other expressly granted powers, including the power to declare and carry on war. The Judge who gave this decision was himself the author of the law which he declared unconstitutional, and had recommended its passage, and had procured the votes of reluctant Senators and Representatives by personal interviews in which he had urged the passage of the measure on the ground that it was impossible to carry on the war without it, and that the Government could neither pay its soldiers nor fulfil its contracts for the supplies and material of war, if it were restricted to gold and silver alone. Among the persons with whom Mr. Secretary Chase had these personal interviews is my late colleague, Mr. Dawes, then a leader in the House of Representatives, and several other living persons whom I might name, as well as a good many who are deceased. I mention this not for the sake of implying any censure upon that great statesman and patriot, Chief Justice Chase, for declaring in his place upon the Bench the law as it then seemed to him, after the exigencies of the war had passed. Indeed, he deserves the greater honor, if, in interpreting the Constitution in his place upon the Bench, he disregarded the consideration that his own reputation might be affected by the charge of inconsistency or by the condemnation which his decision would imply of his own previous conduct. I only mention the fact to show that it was very unlikely that anybody should have expected beforehand that he alone among the leading Republican statesmen of the war period, should have come to such a conclusion.

This decision was announced, as I have stated, on Monday, February 7, 1870. I suppose that opinions were read in other cases, that motions were heard, as was then usual on Monday morning, and that probably

this opinion was not read before two or three o'clock. Indeed, the reading of the Chief Justice's opinion, and those of the minority, must have taken an hour or two. On the same day, February 7, 1870, the nominations of Justices Strong and Bradley were sent to the Senate. The fact that they were sent there was announced in the *Washington Evening Star* of February 7th, and in the Boston and New York evening papers that day. I have now in my hand copies of the nominations which I have obtained from the files of the Senate. They read as follows:

"*To the Senate of the United States:*

"I nominate Joseph P. Bradley of New Jersey to be Associate Justice of the Supreme Court of the United States. "U. S. GRANT.

"Executive Mansion, Feb. 7, 1870."

This is a precise copy of the nomination of the Hon. William Strong, except the name and state. The Senate journal does not show the receipt of any particular nomination until the Senate goes into executive session, which may not be for some days. But the nominations are made public at once, and these were made public all over the country on the afternoon of Feb. 7th. I have also in my hand a copy of what was printed in the *Washington Evening Star* of February 7th. At the head of the first column, first page, under the heading, "Nominations," is the announcement that the President sent to the Senate that afternoon the nomination of Joseph P. Bradley to be Associate Justice of the Supreme Court of the United States, vice E. R. Hoar, rejected; and William Strong to be Associate Justice of the Supreme Court of the United States, vice Edwin M. Stanton, deceased.

In the *New York Tribune* of Tuesday, February 8th, is the Washington letter of February 7th: "The President sent to the Senate to-day the names of Bradley and Strong." In the *Boston Evening Transcript* of February 7th is the statement: "The President has just nominated to the Senate Judge Strong of Pennsylvania and Joseph P. Bradley of New Jersey as Associate Justices of the Supreme Court." But, more than all, the *Boston Herald* published on the morning of February 8th, has, likewise, an announcement of these nominations made the day before. The evening edition of the *Herald* for February 7th is not in our library. I presume you will find the same thing there, though that is unimportant.

The Senate journal, as I have said, does not show the receipt of any particular Executive nomination until it is opened and laid before the body in Executive session, which may not take place for days or weeks, although ordinarily there is one every few days. But the *Congressional Globe* of that morning shows that the Senate merely transacted its routine morning business, and then took up resolutions in honor of a deceased member, and adjourned. It further shows that during the routine morning business, and before the introduction of bills and resolutions, the President's secretary came in with sundry legislative messages. It is the only time he came in that day. So, undoubtedly, the Executive messages nominating the judges were delivered at the same time with the legislative messages, and were upon the table of the Senate a few minutes after 12 o'clock.

I have dwelt upon these details to show the absolute accuracy of my statement and that of my brother, which I shall quote hereafter, that these nominations were made before the decision. But the question whether the Chief Justice announced his opinion or the nomina-

tions got to the Senate first by a few minutes is of the most trifling character, because the President's signature to the nominations must have been made before the session of the Senate that morning, and the Cabinet meeting at which they were discussed was held Tuesday of the previous week, and, as will appear very soon, the nomination of Judge Strong, at least, had been discussed and agreed upon long before.

The decision of the Supreme Court in Hepburn *vs.* Griswold was made and entered when the judges had finished reading their opinions on Monday, Feb. 7, 1870, after the nominations of Justices Strong and Bradley had been laid upon the table of the Senate. It was some hours after they had been signed by the President. It was some days after they had been agreed on in Cabinet meeting. It was weeks after the probable appointment of Judge Strong, as I shall show presently, had been announced in the newspapers. That was the first and only decision of the Supreme Court in Hepburn *vs.* Griswold. I shall speak presently of what took place November 27th, 1869. What I am speaking of now is the decision of the Supreme Court.

The practice of the Supreme Court of the United States is, I suppose, well understood in Massachusetts. It has lately been described by Mr. Justice Harlan in a public address in Cincinnati. I have taken pains also to get from a very high authority indeed a statement to the same effect. The course is precisely the same as that pursued by the Supreme Court of Massachusetts, except that while the decisions of the Supreme Court of the United States are announced, according to the old practice, orally from the bench, the decisions of our Court are now made by a rescript filed in the clerk's office, and accompanied by a brief written statement of the

Court's reasons. The course of proceeding in the Supreme Court of the United States is this: After the hearing of arguments the Judges meet in consultation. Each of the Judges states his opinion as fully as he may desire. After every Judge has been heard, and the matter has been discussed as far as any member of the Court thinks fit, the Judges vote upon the case. The Chief Justice then directs what Judge shall deliver the opinion of the Court. If any Judge dissent, he is at liberty to prepare a minority opinion giving his reasons and the reasons of the other Judges who may agree with him. No record is made of this proceeding, and it is kept absolutely secret within the breasts of the judges until the public announcement of the opinion in the way I have stated. At some future meeting of the Judges, when the opinion of the Court has been prepared, it is read over to the Judges. It is discussed, changed or modified in consequence of any suggestion that may be made. In very recent years it has been the custom of the Judge preparing the opinion to send copies to his brethren. It sometimes happens that an investigation by the Judge who has the responsibility of preparing the opinion changes his mind and suggests to him some new point of view, which he reports to his fellows, and which changes their minds also. I have had this happen twice in my own practice in Massachusetts. One case was Taft *vs.* Uxbridge, where the Court first came to a conclusion in my favor, which was afterward reversed; and one was the case of Wolcott *vs.* Winchester, where the Court first came to a conclusion against me, but afterward decided in my favor. But no record whatever is made of anything except the mere memoranda of the Judges to aid their own memory until the public announcement. Now to call this proceeding a decision

of the Court is, in my opinion, a misuse of language. It is in the highest degree secret and confidential. Any Judge who should betray the confidence of the Court in this matter would be absolutely disgraced, would forfeit the respect of his fellows; and when we consider the effect upon properties and business affairs of many of these decisions of the Supreme Court of the United States, I suppose it is not too much to say that he would deserve impeachment. I inquired of two Justices of the Supreme Court of Massachusetts, both of whom had been reporters, whether they had ever known of this secret getting out from the Supreme Court of Massachusetts since the beginning of the government; and they both replied that they had never known or heard of such a case. In the case of the Supreme Court of the United States I have never known or heard of such a case, with one or two exceptions, although I have been tolerably familiar with that Court and pretty intimately acquainted with every member of it for nearly twenty-eight years. There was a case some time ago where a decision which considerably affected the price of stocks in some way leaked out. Whether it came from some imprudent remark of one of the Judges, or from some page or attendant about the Court room who came across some paper which had been carelessly left exposed, nobody knows. But it excited great feeling on the part of the members of the Bench. Before the Dred Scott decision President Buchanan expressed in his message the hope that the question of the power of Congress over slavery might be removed from political discussion by the determination of the Supreme Court. It was conjectured, but never proved, and I think never believed by the large majority of the profession or the country, that he might have had some understanding in

the matter with Chief Justice Taney. I do not believe it myself. The knowledge that the question was before the Court and the general opinions upon public questions of its members were quite sufficient for President Buchanan's hope, without attributing anything wrong to any member of the Bench.

I ought frankly to concede that to this ascertainment in conference of the opinions of the members of the Court, the term "decision" is not infrequently applied, although there is nothing final in its character. But the word to be used is of no consequence if only the substance of the transaction be clearly understood. There is no finality about it. It is merely what the judges call a "semble." The Judges hold their minds open to reconsider, modify, or reverse their opinions if new light be shed upon the case by the researches of the Judge who prepares the opinion, or by further reflection or further discussion when the opinion is read in full. And they keep these opinions an absolute secret.

A second meeting of the judges was held in regard to Hepburn *vs.* Griswold on the 29th day of January, 1870. The opinion in that case was not read and agreed to in conference until that day. (See the opinion of Chief Justice Chase in The Legal Tender Cases, 12 Wallace, 572.)

The dates with which we have to deal are these:

The opinion of the judges ascertained in conference 27th November, 1869.

The opinion read and agreed to in conference January 29, 1870.

The opinion of the Court announced, and the decision entered upon the docket, February 7, 1870.

The statute increasing the number of judges passed April, 1869, to take effect December, 1869.

The nominations of Judges Strong and Bradley, sent to the Senate February 7, 1870.

Stanton nominated, December 20, 1869.

Stanton died December 24, 1869.

Judge Grier's resignation to take effect February 1, 1870.

Judge Hoar nominated December 15, 1869.

Judge Hoar rejected February 3, 1870.

It appears from the above statement that when the decision was entered and the opinion was publicly announced, there were but four judges upon the Bench who agreed to that decision, out of a Court which when full consisted of nine. This consideration has not the slightest effect upon the validity of the decision. Whether it should have any weight as to the propriety of a rehearing is a fair question.

I have no doubt the Court discussed, in consultation, the case of Hepburn *vs.* Griswold, November 27, 1869, and the opinion of a majority was then ascertained. We will consider presently the question whether that opinion leaked out. But first let us take the history of these appointments. When President Johnson came into power, the Supreme Court consisted of ten members. By the statute of July 23, 1866, it was enacted that there should be no new appointments until by death or resignations the Court should be reduced to seven members, and seven thereafter should be the number of Justices. This statute has been generally supposed to have been passed to take from President Johnson the power of appointing any new Judges in place of some of the members of the Court who were growing old, and whose places, in the course of nature, would shortly be vacant. When President Grant came in, the number of the Court had become reduced to eight members. The

docket had become crowded with business, and suitors had to wait years for a hearing. Accordingly, at the short spring session in 1869, an act was passed increasing the number of justices to nine, and authorizing the President to nominate an additional judge to the session of the Senate, which would take place the following December. The President nominated to that vacancy Mr. Hoar, then Attorney General. This nomination was made December 14, 1869. I have never heard that anybody supposed or intimated that that nomination was made for the purpose of packing the Court, although as you will observe, it was made three weeks after the first conference of the Supreme Court in regard to Hepburn *vs.* Griswold, and the conclusion then arrived at, by whatever name you choose to call it. There were two members of the Cabinet from Massachusetts. There was none from the great State of Pennsylvania, and there was none from the South. I suppose I should not have to go beyond the columns of the *Boston Herald*, or beyond the abundant testimonials of eminent lawyers to support the statement that Judge Hoar's character and legal ability were such as to render no other explanation of his selection necessary.

President Grant had determined upon this appointment months before. September 23, 1869, the President called upon Judge Hoar at his room, stayed two hours, and informed him that there was no lawyer from the Southern States he felt willing to appoint to the Court, and asked him to accept the office. I have now before me my brother's letter to me of that date, in which he states these facts, and asks my advice as to his acceptance.

Mr. Justice Grier, early in December, 1869, sent in his resignation to take effect on the 1st of the following

February. I have not the date when Judge Grier sent in his resignation. But the nomination of Mr. Stanton, his successor, of which I have the record with me, was made by the President Dec. 20, 1869. I have never heard that anybody ever dreamed that the selection of Stanton was made for the purpose of packing the Court. A petition asking his appointment had been sent to the President, signed, if I am not mistaken, by every Republican member of the Senate. He had been a great lawyer. He had been Attorney General of the United States. He was the great War Secretary. With the exceptions of Grant and Seward and Sumner and Chase, he was undoubtedly the most conspicuous figure in American public life. He was a Pennsylvanian, and belonged to the Circuit to which the President would naturally look for a successor to Mr. Justice Grier. Stanton died after accepting the office and before taking his seat, on the 24th day of December, 1869. Mr. Hoar was rejected by the Senate on the third day of February, 1870, four days before the decision of Hepburn *vs.* Griswold.

When Judge Hoar was nominated, it became necessary for the President to look out for another Attorney General. William Strong of Pennsylvania was offered the place. He came to Washington to see about it. I myself saw him there and was introduced to him. I knew at the time that it was expected that he would be my brother's successor, although I cannot say from memory that I heard him say that he expected to take the place. So when Stanton died, and Judge Hoar was rejected and remained in the old office, it seemed almost inevitable that Judge Strong, if he were fit for the place, should be offered one of the vacant Judgeships. He was from Grier's circuit, and from Pennsylvania,

the State in that circuit to whose able Bar the President had looked for an Attorney General. He was admirably qualified for the place. He had been a great judge in his own State. He was not only the head of the Bar in that circuit, certainly the leading Republican lawyer, and he held a place in the reverence and affection of the people who knew him as a man of singular purity and integrity, which I had almost said was equalled by that of John Jay alone. I think I am not over bold when I affirm that the bitterest partisan in this country, of whatever political opinion or from whatever part of the country he may come, will not question in the light of his long service upon the Bench, that the nomination of William Strong needs no explanation other than the statement of the conspicuous merit and quality of the man. This nomination would have been practically inevitable, if the legal tender decision, or the legal tender law, had never been heard of.

Stanton died December 24, 1869. But it was quite natural that the President should not nominate his successor until the question of Judge Hoar's confirmation or rejection was settled. If Judge Hoar had been confirmed, the original plan of having Mr. Strong Attorney General might have been carried out, although he would probably have been appointed to Judge Grier's place. I have no special means of forming an opinion on that question. But the President awaited the final action of the Senate, which undoubtedly had been expected for some time before the final vote, and then sent in the two names together.

I do not think it necessary to vindicate the selection of Mr. Justice Bradley any more than that of Judge Strong. I have heard eminent lawyers compare him

with Chief Justice Marshall, in the vigor and grasp of his intellect, and attribute to him a variety of accomplishment which would not be attributed to Marshall. But such utterances, when we experience a great public loss like that of Judge Bradley, are apt to be extravagant. It is only necessary to say what I am sure every living lawyer who is interested in such things will agree to, that there is no greater or purer judicial fame than that of Judge Bradley among the Judges who were upon the Court when he took his place upon it, or who have been upon the Court from that day to this.

Two things ought, however, to be said: It was by Judge Bradley's advice that the great railroad, for which he was counsel, determined, when the legal tender laws were in force, that honor and duty required them to pay their debts in gold.

It is also true that it is due to Mr. Justice Bradley that the decision of the most important constitutional question since the war, a decision far more important, in my judgment, than that of the legal tender question, was made adversely to the contention of the Republican party and to the general opinion of the people of the North. He gave the opinion of the majority when the Court held that according to the true construction of the fifteenth amendment of the Constitution of the United States, Congress can not interfere when the right of citizens to vote is denied or abridged on account of race, color or previous condition of servitude, unless that denial be by the authority of the State itself, and that the failure of any State to protect such rights, or the banding together of private men, though they may be a majority of the people of the State, to deprive negroes of their rights, does not warrant the interposition of Congress. The result is that the whole

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reconstruction policy of the Republican party, so far as it depended on the exercise of national authority to protect colored citizens in the rights of suffrage, has been overthrown. I did not myself think, and do not now think, that Mr. Justice Bradley was right. But he is the last person to whom Democratic speakers or Democratic newspapers should impute partisanship in his great office.

Now having stated the facts, let us come directly to this foul charge. It can only be sustained by proving three things:

(1.) That the confidence of the Court had been betrayed, and the views of the Judges upon the constitutionality of the legal tender law which they had expressed to each other in their conference, November 27th, had leaked out;

(2.) That these views had become known to President Grant and to the Attorney General or the Cabinet;

(3.) That in consequence of such knowledge they had done something they would not have done but for that.

Now I affirm, first, that there is not one particle of proof, nothing upon which a Judge would let a case go to a jury, nothing upon which any man would act in the smallest transaction of life, in favor of either of these propositions, all three of which must be established to make out the case.

And, second, that all three of them are refuted and overthrown, and that the contrary of each is established by most ample and abundant evidence.

First. Did what took place in the confidence of the Court, November 27, 1869, leak out?

You will agree with me that that would have been a gross breach of confidence on the part of one of the

Judges, which makes it highly improbable, and would require the amplest evidence to sustain it.

A careful examination of the newspapers of the time shows that no such information had reached any of the intelligent newspaper correspondents, or the managers of the press of the country.

You say that your correspondent got some information from the records of the Court. But there was nothing on the records of the Court about the matter until February 7, 1870, when the decision was entered. So you confess that your first knowledge of the matter, aided by your always intelligent correspondent, did not come until the 7th of February. But I have had the files of the principal newspapers carefully examined. You will remember that this was a great question and likely to be of absorbing interest to everybody. Gold was at that time selling at 125. If the decision in Hepburn *vs.* Griswold had stood it would have added 25 per cent. to the weight of every public and private debt in this country, except such public or private debts as were to be paid in gold, whatever had been the decision of the Court. So you may well imagine that newspaper correspondents and business agencies were on the alert about that time. When the decision was actually announced, although I think under the circumstances, which I shall speak of presently, it was not expected to stand, it caused a flurry in securities which were shortly to become due. The following was in the financial article of the *Boston Evening Transcript*, dated, New York, February 8, 1870:

"The decision of the Supreme Court, yesterday, has occasioned considerable discussion on Wall Street. It had some effect on railway mortgages. The Chicago

and Rock Island First Mortgage Bonds, due in a short time, rose to 106 bid, against 100 yesterday."

The Boston papers of the time take no notice of the meeting of the Judges held November 27. There are wild speculations, all erroneous, as to the latter action of the Court before February 7th, when the decision was announced. There is nothing about it in the *Advertiser* or the *Transcript*, if my friend has made the search complete. The *Boston Traveler* has a special dispatch January 31st:

"A rumor was very current about the Capitol this afternoon and created a good deal of excitement that the Supreme Court had rendered a decision against the constitutionality of the legal tender act; but there was no foundation whatever for the story."

This, you observe, was on Monday, the week before the decision was rendered, and was on the day when the Court enters decisions, and refers to a rumor as to the decision rendered by the Court that day, and not to any private conclusion.

There is no mention or speculation in the *Boston Herald* about the decision of the Court until February 8th. On that day is this article in the *Herald:*

"The *Express*' latest financial says, the Supreme Court decision on the legal tender question was the great subject of discussion in financial circles, this afternoon. The decision as understood in Wall Street is that the Legal Tender Act was justified by the war and that Congress has no power to issue any more legal tender notes, and that all contracts made before 1862 are to be paid in coin. In this shape, the decision is certainly a very important one, but its influence on value was remarkably slight. The price of gold advanced in

the morning on private telegrams from Washington to the effect that the decision would be in favor of all contracts made before 1862 being payable in coin, but when the other part of the decision was known this afternoon, the price of gold declined, from the fact that Congress, under the decision, cannot issue any more legal tenders."

Now on the 10th day of February, three days after, is the following editorial in the *Boston Herald:*

"The decision of the Supreme Court of the United States on the Legal Tender Act reads like a warning to all men within the reign of depreciated paper money to prepare for the day of wrath. This decision avoids the question of the constitutionality of the act, as it hinges upon the point that it could not be made retroactive, to affect the value of contracts before it was passed; but it discusses the constitutional power of Congress in the premises in a spirit which indicates that the decision of the main question is only held back to enable the business interests of the country to be adjusted on a solid basis. But the people need not be alarmed. Greenbacks will be taken as money for some time yet, until we can afford to get along without them, or they will have appreciated to the gold standard."

In the *Boston Post*, February 7, 1870, is the following:

" Letter of February 6th. Rumor has it to-night that Hon. J. F. Wilson of Iowa, late Member of Congress, will receive the nomination for the Supreme Court; but, although General Grant places a high estimate upon Mr. Wilson, he will not probably select him for the position, because Mr. Wilson does not reside in the southern nor the third or Pennsylvania circuit, where the vacancies exist, and it is conceded that the new Judges must come from those circuits. There does not appear

to be any doubt that Judge Strong will be nominated for the vacancy made by Judge Grier's resignation, and the belief is general that Mr. Durant of Louisiana will be nominated for the vacancy occasioned by the death of Justice Stanton."

The following also appears in the *Boston Post:*

"February 1. Special dispatch of Janury 31, 1870. It is understood that the President will send to the Senate to-morrow the nomination of a successor to Justice Grier. All agree that Judge Strong of Pennsylvania will receive the nomination."

"February 7, 1870. Letter of February 5th. (Associated Press.) The President will as soon as he shall receive official notice of the rejection of Judge Hoar, nominate to the Senate two gentlemen to supply the vacancies on the Supreme Court Bench, one of whom is Judge Strong of Pennsylvania. The President has not fully determined upon the other. The President informed a friend yesterday that Judge Hoar would remain in the Cabinet."

In the *Boston Journal* there is a letter January 31, 1870, which is as follows:

"It is understood that the President will to-morrow appoint Judge Strong as the successor of Judge Grier. The retiring Judge endeavored, it is said, to have the Court agree to a decision which he had drafted, that all contracts and agreements made prior to the passage of the Legal Tender Act were payable in gold, but some of the Judges were doubtful."

There is a dispatch to the *Boston Journal*, February 2d, as follows:

"The forthcoming decision of the Supreme Court on the cases in which gold was claimed instead of greenbacks on contracts made before the passage of the Legal Tender Act of 1862, but not settled until afterwards, will carefully avoid the question of the constitutionality of the act itself. The decision will simply be that all contracts made previous to the passage of the act, no matter when they were payable, call for payment in gold."

I think you will agree with me that no rumor of any conclusion of the Court made November 27th had reached Boston, or any correspondent of the *Boston Herald.*

My friend who made the search for me finds nothing in the leading New York papers of the time except this letter in the *New York Tribune*, February 1st:

"From information which seems unquestionable it is learned that on Saturday a consultation was held by all the members of the Supreme Court, including Justice Grier, etc., etc. A decision of the Court was expected to-day, was not delivered. There is ground for believing that the decision will not go into the question of the constitutionality of the law, but will decide that all contracts made previous to the passage of the act contemplated payment in gold, and the Court will so decide. It is believed the opinion will be delivered next Monday."

It is a curious fact that gold steadily declined from the 27th of November, 1869, when it sold at 125¼, highest, and 123⅞, lowest, down to February 8, 1870, when it sold at 121, highest, and 120¾, lowest. The *Tribune* of February 9th has this statement:

"The Supreme Court seems to have put the bulls in possession of the market, as almost everything in the shape of bonds and stock has an upward tendency. The bears appear to be the strongest in the gold room, as that is heavy."

Two inferences seem plain from this narrative:

(1.) That nobody connected with the press or with financial matters knew anything about the secrets of the Supreme Court, and that the few statements about the matter in the press between November 27th and February 7th were the wildest conjectures. The only conjectures that appear are that the Court had not dealt with the question of the constitutionality of the act, and that the only thing they did was to hold contracts dated before 1862 payable in gold; and

(2.) That there was a strong expectation that the decision would not stand. Although gold was selling at 120 in greenbacks, the price of gold did not rise any farther, and the only effect on the market was to make a large increase in the values of securities which were payable within a short time.

SECOND. Did any knowledge of the conclusion of the Court, November 27th, reach President Grant or the Attorney General, or the Cabinet? Now you will observe that there is not the slightest affirmative evidence that any of them had any such knowledge whatever, and without such knowledge the whole charge breaks down. But we are not left in this matter to the absence of evidence. We have the absolute denial of the gentlemen concerned. I have seen a letter of Mr. Fish, which I have not been able to find, but which is in existence somewhere, in which, if I can trust my recollection, he denies for himself, and on the authority of President

Grant, for him, any such knowledge and any such purpose in these appointments. But Mr. Fish's son and son-in-law have both been out of the country, and his papers locked up in a vault, so I could not have a search made among them. But I have in my hand a letter from Mr. Fish to Judge Hoar, containing a message from President Grant to the effect that he made the nominations before the decision was announced, and that the records at the Executive Mansion show it. This fact is stated by President Grant to Judge Hoar to be used in his reply to Butler. Of course, if he had known the Court's opinion when he made the nomination, such a statement would have been a wretched subterfuge.

I have received this letter from Governor Cox. He was then Secretary of the Interior in Grant's Cabinet. He dwelt in the same house with Attorney General Hoar during the summer until the meeting of Congress on the first of December, 1869, and was the Judge's intimate personal friend. He would certainly have known of this matter, if it had been known, both as a member of the Cabinet and from his familiarity with Judge Hoar. This is the letter:

"CINCINNATI, 6 November, 1896.

"*My Dear Senator Hoar:* In reply to yours of 3d inst., I would say that I have always regarded the charge that the Supreme Court was 'packed' to reverse the Legal Tender Decision in Hepburn *vs.* Griswold, as one of the most curious instances of drawing an unwarranted conclusion from a mere coincidence. When I originally heard the assertions made, I carefully reflected, to see whether I could recall any fact which sustained it. I could not. Every incident pertaining to the appointment of Judges to fill the vacancies was, so far as my recollection could reach, exactly what high-minded men would wish — exactly what all who knew Judge Hoar would expect from an Attorney General having his high ideals of public duty.

"I can recall some discussion of the character and qualities of Judges Strong and Bradley among members of the Cabinet, but not a single word of reference to their opinions on the Legal Tender question, or to any case pending, or likely to be pending, in the Supreme Court. Nothing could be plainer than that the Attorney General was earnestly determined to recommend only such men as combined the qualities of able lawyers with those of perfectly pure, single-minded and upright citizens. When the nominations were made we felt that just such men had been selected.

"I am the more sure that I should have been quick to notice anything inconsistent with the good purpose I have described, because, as a matter of fact, my personal convictions then were, and still are, that the opinion of Chief Justice Chase in Hepburn *vs.* Griswold, as well as in the subsequent Legal Tender Cases, so called, was the better one in law, and a sounder one in statesmanship, as well as the solider barrier against all forms of fictitious or 'fiat' money.

"One of your brother's strongest claims to public reverence as a departed worthy, in my judgment, is the unflinching adherence to the highest possible rule of action in sifting and selecting judicial nominations as Attorney General, and this was most noticeable, as it should be, when the positions to be filled were the highest.

"Faithfully yours,

"J. D. Cox."

Governor Cox resigned his place in the Cabinet not long after this transaction, stating in a public letter his reasons for resigning, that he had not been duly supported by the President in his attempts to protect the rights of the United States against fraud. It is absolutely incredible, and I do not believe any man in the country will suggest that Governor Cox would have forgotten such a transaction, or that he would have screened it from public condemnation.

I also have a letter from Governor Boutwell, formerly Secretary of the Treasury.

GOVERNOR BOUTWELL'S LETTER.

"GROTON, November 5, 1896.

"*My Dear Sir:* My answer to your letter of the third of this month must be by negative statements rather than by affirmative

assertions. The charge to which you call my attention is this: That, in the year 1870, the Supreme Court was packed by President Grant for the purpose of reversing the Legal Tender Decision in the case of Hepburn *vs.* Griswold; and that when the names of Messrs. Strong and Bradley were sent to the Senate, February 7, 1870, the nature of the decision in the above named case, although it had not been announced from the Bench, was known to the President and Cabinet.

"I was a member of General Grant's Cabinet at the time mentioned, and I was present at one or more Cabinet meetings when the subject was considered, and when opinions were expressed as to the fitness of Messrs. Strong and Bradley for the vacant places upon the Bench of the Supreme Court. The Legal Tender Controversy was not spoken of, nor in any manner referred to by the President or by any member of the Cabinet. Indeed, the conversation was limited. Strong and Bradley were then, without controversy, at the head of the profession in the States of Pennsylvania, New Jersey, Maryland, and Delaware. At that time there was a Justice on the Bench from New England, one from New York, and one from the Pacific coast, and four from the central States of the West. At that time the South was not considered.

"Since the controversy was opened the statement has been made that Judge Strong had recognized the constitutionality of the Legal Tender Law in his place as Judge of the Supreme Court of Pennsylvania. I cannot say whether that fact was known to the President, or to any member of the Cabinet, but there was no reference to the opinion of either Strong or Bradley.

"Very truly,

"GEORGE S. BOUTWELL.

"To the Hon. George F. Hoar, Worcester, Mass."

But the denial with which I am most specially concerned just now is that of the Attorney General himself. This charge is almost the only one ever made against him, in a public life full of earnest conflicts, which he ever cared much to refute. When he was a candidate for Congress against General Butler, in 1876, he was attacked vigorously by Butler and Wendell Phillips, the most accomplished and unscrupulous

masters of invective who ever lived on this continent. He treated all their charges with great unconcern. He declared in a public meeting that he should not trouble himself to answer any other charge of Butler's, except this one of packing the Supreme Court, which concerned the honor of President Grant as well as his own. I quote his exact language from the *Boston Herald* of Thursday, November 2, 1876:

HOAR'S ANSWER.

BUTLER'S CHARGE THAT HE PACKED THE SUPREME COURT REFUTED.

"There is one thing in his (General Butler's) letter, however, being upon a public matter, an assault upon the Republican administration, upon the President of the United States much more than upon myself, which I think it proper for me to answer as a matter of public discussion.

"I am sorry to be obliged to say, in connection with it, that when I state what it is and what the facts are, and tell you on what evidence they rest, I must ask you to consider whether you believe that General Butler could not have known the facts. What account he would give, or explanation, I can't say. I will state to you the accusation which he says is the worst and gravest he has to make. It is that I advised the President to pack the Supreme Court of the United States with two additional Judges in order to secure the reversal of the first decision on the Legal Tender Act, which held that that act was unconstitutional. Well, now, the simple answer to that is that the nominations of these two Judges, Judge Strong and Judge Bradley, were sent

by the President to the Senate before that Legal decision was announced, when neither the President nor myself knew what it was going to be. The Judges of the Supreme Court kept their own opinions, and, until they were read, nobody knew what they were. Well, now, as to the fact that these new Judges were in favor of the constitutionality of that Legal Tender Act. About every State Court that had passed upon it—the Supreme Court of Massachusetts, of New York, and so you may go through the States—or a large number had sustained its constitutionality. The only State Supreme Court that had decided the other way was the Supreme Court of the half rebel State of Kentucky. The Chancellor of that Court, the ablest judge upon it, gave a dissenting opinion from his associates, and agreed with the rest of the country. Now how could President Grant have appointed a judge to that Court who was not a believer in the Legal Tender Act? He would have had to rake over the country with a fine tooth comb to find a man who was not in favor of it. But to say that the appointment was made, and that I advised it in order to reverse that decision, is to say what the data show conclusively to be

UTTERLY UNTRUE.

"General Butler says in his letter to me that 'On Monday, the 7th of February, 1870, the Judges read their opinions and rendered their judgment on the Legal Tender Act. On Tuesday, the 8th, being Cabinet Day, you advised the President to make nominations of two judges to reverse that decision.' On Monday, the 7th day of February, 1870, when the Senate met, these nominations were sent in. In the *Washington Chronicle* and *Washington Republican* of Tuesday morning, in

an account of the business transacted in the Senate the day before, mention was made of these nominations, accompanied by editorial comments and biographical sketches of the gentlemen nominated. General Butler says it appears by the record of the Senate that on Tuesday I advised the President to do this. Well, of course, that literally is obviously untrue, for the record of the Senate does not show anything about anybody's advice. But what he means to say is that it appears by the record of the Senate that these nominations were sent in on Tuesday. Now, the Senate has two sessions, an executive session in which nominations are considered, and a legislative session. The business is not entered on the Executive Journal till the Senate goes into executive session, and these nominations, which had been sent to the Senate on Monday, were not entered on the Executive Journal till Tuesday. But I have other proof. I hold in my hand a letter which I have, this morning, received in which the President of the United States, General Grant, authorizes the statement which I will read:

"'The records of the Executive Office show the date of the President's messages nominating Judges Strong and Bradley to have been February 7, 1870.' This same charge against President Grant was made in the campaign of 1872. Some newspaper started it on that side. I happened to see it in the *New York Nation*, copied, and I sent a letter to the *Nation* at that time, exposing the slander and showing that the nominations were made before the decision was rendered, and the editor of the paper withdrew it and said it was a complete answer.

"Again, in the last Congress of which General Butler and myself were members, a Democratic member from

Wisconsin, Mr. Eldridge, while making a speech attacking the administration, alluded to the charge, and I replied to it, and stated that the nominations were made before the charges were brought, and he subsided."

You will observe that this story has grown since General Butler's time. His charge, which you will find set forth in his letter, published in the *Herald* at the time, was that on the next cabinet meeting day after the decision was reached on the 7th of February, President Grant was advised to pack the Court. That form of calumny has been dropped. It broke down before the recorded facts. It is only later that the suggestion is made that the confidential conference of November 27th may have been betrayed by one of the Judges.

Now the *Herald* was an earnest supporter of Judge Hoar in that campaign. You say of him, among other things, in your editorial, October 12, 1876 :

"We have always been free to criticise Judge Hoar, but we have never had occasion to question his thorough integrity or to doubt the sincerity of his contempt for the arts by which political quacks like Butler succeed. * * * We were told in Washington two or three years ago, when Judge Hoar was there, that no other man in the House commanded so much respect as he on any question of fact, and his reputation is an accurate picture of his character. * * * He has made a record in the service of his country, on which he can afford to rest his case. He has always been sound, clean, and above all suspicion. * * * He has great ability, but his strongest point is a character that commands the respect of all men who know him. There is an absolute certainty that he will be true to his convictions, that he will make no concessions to what he believes to be wrong to get

office or public favor, and that he will do all that one man can do to raise our politics to a higher plane of integrity and purity."

Now it is the man of whom you said this whose reputation is in question. It is for defending him that you ask me to apologize to Mr. Fairchild, when less than two years after his death I deny with some indignation that he committed an act of infamy and sought to cover it by a lie.

But Judge Hoar did not wait for six years after the transaction before he made this denial.

In April, 1872, the *New York Nation* made the charge not in a statement, but put it in the form of a question to *Harper's Weekly*, then, I believe, edited by Mr. Curtis:

"Why," asks the *Nation*, March 7, 1872, "did he (Grant) select new judges for the Supreme Court with special reference to their opinion on a question already *sub judice*, or in other words, pack the Court to procure a judgment on a question of property favorable to his own views of political expediency?"

The *Nation*, April 11, frankly and honorably answers its own question, saying:

"We shall ourselves make a contribution to his defence." The *Nation* then quotes Judge Hoar's answer, and says:

"We consider this a good and sufficient answer to one of our questions, though it does not change our opinion on the propriety or expediency of bringing up the Legal Tender cases for a fresh decision."

Of that I will say something before I get through.

Judge Hoar then addressed a letter to the *Nation* which will be found in its issue of April 15, 1872, in which he says:

"Mr. Stanton was selected and confirmed to fill this vacancy, but he died on the 24th of December, 1869. Judge Strong, a man of the highest professional and personal character, who had recently left the Supreme Court of Pennsylvania, with a brilliant judicial reputation, was soon selected in Mr. Stanton's place, and his nomination was only withheld because the Senate had not acted upon the other nomination before them. Judge Strong had, it is true, given an able opinion sustaining the constitutionality of the Legal Tender Act; but the constitutionality of that Act had been upheld by the highest Court of every State in the Union which had passed upon it, except Kentucky; and it would hardly be expected that the President's range of choice should be excluded from the highest Courts of all the loyal States.

"The Senate disposed of the nomination previously before them on the 3d of February, 1870, which was Thursday. On Monday, February 10th (this is a misprint in the *Nation* for February 7th), the nominations of Judge Strong and Mr. Bradley were sent in. They had been determined on the preceding week, and actually prepared for transmission either on Saturday or early on Monday morning. The decision of the Supreme Court on the Legal Tender Act in Hepburn *vs.* Griswold was announced on the same day. I do not believe that the President had any knowledge of what the decision was to be. Some of the newspaper correspondents were asserting in the press up to that very morning that it was to be a decision the other way. I do know, however, that Mr. Bradley was selected on the ground of professional fitness for the position, as an eminent, sound and able lawyer. I knew he was a Republican, and supposed, though I did not know, that he thought the

Legal Tender Act constitutional. But I had no more reason to suppose that he was of that opinion than that Chief Justice Chase was; or that he was any less likely to change his opinion upon the strength of new arguments. I had been told that he had advised clients to pay their old debts in specie, without regard to legal compulsion, which agreed precisely with my notions of honesty."

The *New York Nation* of November 9, 1876, returns to the matter, and pronounces General Butler's charge of packing the Court to be "one of Butler's lies"; gives an account of what was printed in 1872, and says:

"This ended the affair as far as we were concerned, and, we believe, as far as the intelligent public was concerned. That it should be brought up again, with embellishments, by the old Conqueror and Humanitarian of Lowell and the adjacent country, is not surprising."

Judge Hoar also met and silenced this story on the floor of the House of Representatives when it was revived by Mr. Eldridge of Wisconsin. The debate will be found in the *Congressional Record* for April 1, 1874, vol. 2, part 3, page 2709; and for April 7, 1874, pages 2889 and 2890. In that debate Judge Hoar said:

"I know those nominations were made out and sent to the Senate before the legal tender decision was made, before I knew or had any reason to know what it was to be. I supposed the Court kept their own counsels; they do about their decisions. * * * I know it was reported in this city on the morning of the day on which the decision was given that it was to be the other way. And, with my knowledge of Chief Justice Chase, I must say that I gave him credit of sharing in that opinion until it was delivered. * * * Mr. Justice Strong's nomination had been agreed on, as was understood, for

weeks before. That of Mr. Justice Bradley was recommended, as I understand, by the whole Bench and Bar of New Jersey without distinction of party. * * * That Mr. Justice Strong, whose nomination had been for some weeks talked of, and understood to be agreed on, was of the opinion that the Legal Tender Act was constitutional, is undoubtedly true. He had, as Judge of the Supreme Court of Pennsylvania, given an opinion—one of the ablest, if not the ablest, delivered by any State Judge—in favor of the Constitutionality of that Act. But was that a reason why he should have been excluded from the nomination, or why it could be said that he was picked out for a particular purpose and not on account of his eminent professional record, the purity of his character, and his marked fitness for the office which he now adorns? If such a rule had been adopted I can only say that the Judges of every State Court in the Union that had passed on the question, with the exception of the State of Kentucky (and in that State the Chancellor, the ablest of the highest Judges there, gave a dissenting opinion), would all have been excluded, because every State Court before which the question had arisen (with the single exception I have indicated), had sustained the constitutionality of the Legal Tender Act. If such a rule had been followed the President must have gone around groping to find somebody adverse to the general sentiment of his party and the general sentiment of his country to take a position on the Supreme Bench.

"I say to this House and to the country that the selection of those two gentlemen was made on character, on professional eminence, on fitness for the office; and, whether the slander was originated by one man or another, it is a slander upon them to attribute their

appointments to their subserviency upon a particular question or for a particular interest. Their appointment was sent to the Senate before the decision on the Legal Tender Act was announced."

Now I ask you again whether you think Judge Hoar lied about this matter. I have just quoted one or two of the tributes which were paid to him after his death. I wish to quote two or three more. Let no person suspect me of the folly of thinking that it is necessary to furnish certificates of my brother's character to the people or the generation that knew him. I trust I have better sense and better taste. But this calumny will thrust up its dirty head fifty or one hundred years hence if there are men to be found then as there are now to rake up and write the discarded slanders of past generations and call it history. I wish to collect and preserve in this letter the material for its complete refutation whenever it may reappear. I wish to quote two or three tributes to his character which came from his political opponents, and from lawyers who would be pretty likely to have known the truth of this matter.

Do you think of any other occasion in his life when any man suspected that he ever did or said or thought anything he was not willing to avow?

The *Boston Herald* said of him on the third of November, 1895:

"On the basis of a character of granite strength, of a rugged honesty as well as a genuine depth of piety, was reared a range of rare qualities in the way of shrewd Yankee perception, of illuminating wit and of a startling originality of common sense that made him a marked man everywhere."

Mr. Darwin E. Ware pays a loving tribute in verse, beginning with these words:

> "On conscience, as on rock New England's hills,
> His life was built."

Chief Justice Field, who was Assistant Attorney General at the time this crime was committed, if it was committed, says:

"He has left behind him an example of disinterestedness, sincerity, courage, nobleness of purpose and strenuous endeavor to make the world better worth living in, which is easy to praise, but not easy to imitate."

The Chief Justice says on another occasion:

"He was about the best specimen we had of a witty, wise, courageous, public-spirited, God-fearing New England lawyer."

Hon. Jacob D. Cox, whose letter I have given, says:

"For hearty love of right and for sturdy and unflinching support of it; * * * for purity of heart and sincere reverence for all that is divinely taught — he was a man for his country to be proud of and for his friends to model their own lives upon."

Charles Francis Adams says:

"He was essentially a Puritan. Honest himself, and intuitively sensitive to dishonesty in others."

Attorney General Knowlton says:

"The elements of character which have given Massachusetts her position in history were to be found in a marked degree in him."

Mr. Joseph B. Warner said:

"The man was moved by two master passions — one a stern and solemn sense of duty, inflexible and irresisti-

ble, applied most severely to himself; the other a warm and tingling sympathy with human nature in all its moods, gay or sad. * * * In two worlds he has always lived, at home alike on the cool heights of righteousness and judgment, and on the warm and sunny level of human joys and sorrows."

James Russell Lowell, a little earlier, said of him:

"You cannot set too high a value on the character of Judge Hoar. I have known Mr. Hoar for more than thirty years, intimately for more than twenty, and it is the solidity of the man, his courage and his integrity that I value most highly."

Frank P. Goulding speaks of the political and moral greatness of the man, and says a powerful moral force has passed away.

Edmund H. Bennett says:

> "Whatsoever things are true,
> Whatsoever things are honest,
> Whatsoever things are just,
> Whatsoever things are pure,
> Whatsoever things are of good report —

These were his; all these were his, preëminently his, and no man taketh them from him."

William G. Russell, who knew him through and through in an intimate friendship, says:

"He stands for all that is best in New England character."

Mr. Causten Browne, an eminent Democratic lawyer, declared in the resolutions which he moved for the Bar, that he had "proved himself an able, learned, brave and upright, strong man — strong in perception and

understanding, strong in character, strong in conviction and resolution, strong in an unclouded sense of duty."

If I accumulate these things needlessly, it must be remembered that I am defending the reputation of my brother, a reputation dear to me as my own, against the one charge ever made against him for which he cared, or which excited his indignation.

THIRD. What earthly evidence is there that the President or the Attorney General did not do exactly what they would have done if the Legal Tender decision had never been heard of?

The highest courts of New York, California, Indiana, Iowa, Pennsylvania, Massachusetts and the District of Columbia had upheld the constitutionality of the Act. There had never been a final decision in the country the other way, except that of the Court of the half-rebel State of Kentucky, and there the very able Chancellor was in favor of sustaining the Act. In Massachusetts the decision had been concurred in by three Chief Justices. Although Chief Justice Bigelow did not sit, owing to a technical and infinitesimal disqualification of being a stockholder in the company which was defendant in the case, yet I presume there is no doubt that he concurred with his brethren. The Act passed a Republican Congress eight years before, and had been approved by President Lincoln and every member of his Cabinet. It had had the general approbation of the Republican party throughout the country. Were all the Republicans who supported the Act, were all the Judges of all these States, or the entire Republican Bar of the Pennsylvania circuit, were men like Bradley and Strong, to be excluded from consideration as candidates for this great office by President Grant because

they believed in the constitutionality of a great measure to which their party was committed? If the President had appointed two Judges who had turned out to be of another way of thinking, would he not have been justly liable to the charge of packing the Court to overthrow the Act and sustain the previous decision? He would have had to rake the country as with a fine tooth comb to have found such men anywhere in the North who would have been otherwise eligible to the office. I have myself heard of but two respectable Republican lawyers who agreed to the decision in Hepburn *vs.* Griswold. One is Judge Cox, one of the best of men, a man who would adorn any situation for which he might be selected. But he belonged to the Ohio circuit which already had two judges upon the Bench of the Supreme Court, Chief Justice Chase and Judge Swayne. The other was my beloved personal friend and instructor, Judge Thomas of Massachusetts. But I am sure that he would not in 1870, or for many years before, have permitted anybody to call him a Republican. I think I may safely challenge any man to name a Republican lawyer in the country of whom anybody now will say there was any propriety in appointing him to the Supreme Court of the United States at that time, who would not have supported the constitutionality of the Legal Tender law. Why, every Judge who was appointed to that Court for the next 25 years, every one, was opposed to the decision in Hepburn *vs.* Griswold. Have all subsequent Presidents of the United States been engaged in this packing business? The *Boston Herald*, I believe, though I have not looked to see, earnestly commended the selection of Judge Gray when he was appointed by President Arthur. Does anybody think that every Republican President of the

United States from Grant down to Harrison should have laid aside all other considerations and devoted himself to finding judges who were opposed to the conclusions of the Court in this matter? They must have gone into the Democratic party to do it. I am not myself opposed to the appointment of Democratic Judges on suitable occasions. I very earnestly approved the selection by President Harrison of that admirable Democrat, Mr. Justice Jackson, for the Supreme Bench. Yet, if I mistake not, that appointment is the only instance in our history of a President who has gone out of his own party for a Supreme Court Judge. But I should hardly expect that any President would go outside of his own party for a Supreme Judge in order to get a man who could be depended upon to overthrow one of the great measures to which his party was committed. My dear man, if everything else be conceded, if it be supposed, if it be granted, that what took place in conference Nov. 27 was a decision, that it leaked out, that President Grant and the Attorney General knew it, that they knew the opinions of both Bradley and Strong, you have not advanced one step toward proving this charge. The President did exactly what he would have done, what he must have done, unless he had gone into the Democratic party for Judges for the sole purpose of packing the Court the other way.

It is said in a biographical sketch of Mr. Justice Bradley (page lxxi., 1st vol., Indexed Digest to United States Supreme Court Reports, published by the Lawyers' Co-operative Publishing Co.), that when Mr. Justice Grier sent in his resignation, in December, 1869, he accompanied it with an earnest letter to the President urging the appointment of Mr. Justice Bradley as his successor. Was Mr. Justice Grier, the eminent

Democratic Judge who concurred in the decision of Hepburn *vs.* Griswold, and without whose vote there could have been no majority in its favor, engaged in this infamous scheme for packing the Court?

I ought perhaps to say something of one other matter. The question whether there ought to have been under the circumstances an application to the Court to reopen the question determined in Hepburn *vs.* Griswold is one in regard to which there may be fair difference of opinion. After that decision was made known, Judge Hoar proposed to bring forward another case then on the docket which involved the same question and have it heard again. It was claimed by counsel on the other side that that case had been continued with the agreement that its decision should abide that of Hepburn *vs.* Griswold. I believe a highly respectable counsel who was in the case made affidavit that that was his understanding. But there was no pretence that that agreement had been made with Mr. Hoar. Mr. Evarts and all persons in the Attorney General's office at the time the agreement was alleged to have been made denied that they so understood it. But the parties to the suit who had the right to control that case abandoned it, and nothing came of that application. Another case to which there was no pretence the agreement applied was afterward argued by Attorney General Akerman, Mr. Hoar having gone out of office, and the decision of Hepburn *vs.* Griswold overruled. But Judge Hoar doubtless thought, as he says in his letter to the *New York Nation*, that the application was one proper to be made. In this I entirely agreed with him at the time, and agree with him now. The decision of Hepburn *vs.* Griswold when gold was above twenty per cent. premium added twenty per cent. to the burden of all public and

private debts in the country. If the decision was to be overruled later, when the matter came up in the course of business, it was surely better that the country should know at once what was to be the permanent law, and not go for a year or two under Hepburn *vs.* Griswold, and then have another decision reversing that and throwing business again into confusion. The wisdom of the course pursued is evident from the fact that Hepburn *vs.* Griswold caused no panic and very little fluctuation in the market except in regard to securities which were payable within a very short time. Whether Mr. Hoar was right or wrong in this opinion, he acted upon it, and never desired for a moment to evade the just responsibility.

The reasons for granting a rehearing cannot be better stated than by Mr. Justice Strong in his opinion, 12 Wallace, 529:

"It would be difficult to over-estimate the consequences which must follow our decision. They will affect the entire business of the country and take hold of the possible continued existence of the government. If it be held by this Court that Congress has no constitutional power, under any circumstances, or in any emergency, to make treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States), the Government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable, even if they were not when the acts of Congress now called in question were enacted. It is also clear that if we hold the acts invalid as applicable to debts incurred or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derange-

ment, widespread distress, and the rankest injustice. The debts which have been contracted since February 25, 1862, constitute, doubtless, by far the greatest portion of the existing indebtedness of the country. They have been contracted in view of the Acts of Congress declaring notes a legal tender, and in reliance upon that declaration. Men have bought and sold, borrowed and lent, and assumed every variety of obligations, contemplating that payment might be made with such notes. Indeed, Legal Tender Treasury notes have become the universal measure of values. If now, by our decision, it be established that these debts and obligations can be discharged only by gold coin; if, contrary to the expectation of all parties to these contracts, Legal Tender notes are rendered unavailable, the government has become an instrument of the grossest injustice; all debtors are loaded with an obligation it was never contemplated they should assume; a large percentage is added to every debt, and such must become the demand for gold to satisfy contracts, that ruinous sacrifices, general distress and bankruptcy may be expected. These consequences are too obvious to admit of question."

I hope and believe that after reviewing this whole case you will agree with the *New York Nation*, and will do justice to the memory of a man who was as constant, staunch and thorough-going an advocate of honest money and a steady standard of value, and of paying all government debts in gold, as ever lived. Judge Hoar always took great satisfaction in remembering that while he was in Gen. Grant's Cabinet, and afterward during a friendship and confidence which was unbroken till Gen. Grant's death, he never failed to improve every occasion to urge upon him the importance of maintaining the specie standard and the financial honor of the

Government. He believed and I believe that these counsels were of great effect and that the country owes to them a great deal more than it will ever know in the maintenance of its financial integrity.

I am, faithfully yours,

GEORGE F. HOAR.